

STATEMENT OF THE CASE

Defendant-Appellant Bryan Stone is appealing his conviction by a jury of the Class C felony of battery resulting in serious bodily injury. Stone was acquitted on a rape charge. Stone was sentenced to eight years executed.

We affirm.

ISSUES

Stone states the issues as:

1. Whether the court erred in admitting the final instruction defining serious bodily injury.
2. Whether the court erred in admitting the photos into evidence.
3. Whether the evidence was insufficient to convict Bryan of battery.
4. Whether the trial court erred in sentencing Bryan.

FACTS

The evidence shows Stone, two other men, and the victim, T.E., got into a car. T.E. did not know Stone prior to getting in the car. They smoked marijuana and Stone drank alcohol as well. After about two hours of this activity Stone and T.E. were dropped off at his car. They drove around for a while, Stone got more alcohol, and they ended up at Stone's house. Stone and T.E. went out to eat and then returned to Stone's house. After they smoked more marijuana they went into the bedroom and "started to have sex." T.E. said she was then knocked unconscious when Stone hit her either with his fist or a beer bottle. When T.E. regained consciousness, her eye was swollen shut and

her whole body was black and blue. Stone continued beating T.E., striking her with a belt, his fists, and a beer bottle. T.E. estimated that Stone hit her about fifty times.

Additional facts will be disclosed as needed.

DISCUSSION AND DECISION

Issue 1-The Instruction

Stone first argues that it was error for the trial court to give an instruction defining serious bodily injury. In general, the use of jury instructions lies within the sole discretion of the trial court. *Brown v. State*, 830 N.E.2d 956, 966 (Ind. Ct. App. 2005). We will reverse the trial court's decision regarding jury instructions only for an abuse of that discretion. *Id.* Jury instructions are to be considered as a whole and in reference to each other, and we will not reverse the trial court's decision as an abuse of discretion unless the instructions as a whole misled the jury as to the law of the case. *Id.* When evaluating whether a trial court erred in refusing or giving an instruction, we examine the following factors: (1) whether the instruction correctly sets out the law; (2) whether the evidence supports the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that were given. *Id.* To obtain a reversal, a defendant must affirmatively demonstrate that the instruction error prejudiced his substantial rights. *Id.*

Stone was charged with battery as a Class C felony pursuant to Ind. Code § 35-42-2-1(a)(3). The charging information, in pertinent part, states, "Bryan Stone did knowingly touch [T.E.] in a rude, angry or insolent manner, to-wit: hitting her with his

hands, fists, black leather belt, Budweiser beer bottle and blue broom; resulting in serious bodily injury, to-wit: loss of consciousness. . . .”

The jury, over objection, was instructed, “The term serious bodily injury means bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ.” The instruction tracks the applicable portion of I.C. § 35-41-1-25.

The jury was also instructed by the reading of the charging information set forth above. However, Stone contends that the charging information only alleges “loss of consciousness,” whereas the instruction alleges a number of other acts with which he has not been charged, but could be found guilty on.

The argument that Stone raises in this issue has been found not to be error when the trial court instructs the jury in a manner that exceeds the scope of the crime that he was accused of. *See, Emerson v. State*, 695 N.E.2d 912, 916-7 (Ind. 1998). There is no prejudicial error resulting from jury instructions that exceed the scope of the crime as charged if the jury is instructed expressly on the charge against the defendant, and the State offers evidence to prove that charge. *Id.*

We find no error in the giving of this instruction.

Issue 2-The Photos

The State introduced color pictures of T.E. showing her injuries and bruises. The pictures were made shortly after the incident when she was at the hospital and, three days later, by the police department. Stone objected on the grounds that the photos were a

substantial variance from the charging information, and that they were irrelevant as defined by Ind. Evidence Rule 403.

A trial court has broad discretion in ruling on the admissibility of evidence and we will reverse a trial court's ruling on the admissibility of evidence only when the trial judge abused its discretion. *Cannon v. State*, 839 N.E.2d 185, 190-1 (Ind. Ct. App. 2005). Generally, photographs depicting injuries of a victim or demonstrating the testimony of a witness are relevant and admissible. *Allen v. State*, 686 N.E.2d 760, 776 (Ind. 1997), *cert. denied*, 525 U.S. 1073, 119 S.Ct. 807, 142 L.Ed.2d 667 (1999).

Assuming the admission of the photographs of T.E. was error, we note that any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted. *Wilhelmus v. State*, 824 N.E.2d 405, 413 (Ind. Ct. App. 2005). T.E. testified without objection about her injuries and bruises. We are of the opinion that the photographs were cumulative of her testimony and accordingly it was not error to admit them into evidence.

Issue 3-Sufficiency of the Evidence

Our standard of review when considering the sufficiency of the evidence is well settled. *Morrison v. State*, 824 N.E.2d 734, 742 (Ind. Ct. App. 2005), *trans. denied*. We will not reweigh the evidence or assess the credibility of witnesses. *Id.* We will only consider the evidence most favorable to the judgment, together with all reasonable inferences that can be drawn therefrom. *Id.* We will uphold a conviction if there is

substantial evidence of probative value from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

Stone's argument on this issue focuses on the following questions by the State and T.E.'s answers:

Q. OK. And you started to have sex. What happened next?

A. Um one minute I was having sex and the next minute I woke up and my eye was swelled shut and my whole body was black and blue.

Q. Had you passed out?

A. I had been unconscious. I had been knocked unconscious.

Stone suggests that T.E.'s unconsciousness was a result of her consumption of alcohol and marijuana and not the result of being beaten by Stone.

The issue, however, is whether the inferences supporting the judgment were reasonable, not whether there were other more reasonable inferences that could have been made. *Brink v. State*, 837 N.E.2d 192, 197 (Ind. Ct. App. 2005), *trans. denied*. Reaching alternative inferences such as this is a function of the trier of fact and not of the court on appeal. *Id.* We cannot reverse the conviction merely because one inference is a plausible one that might have been drawn from the evidence. *Id.*

The evidence is sufficient to support the verdict.

Issue 4-The Sentence

Stone argues that his eight-year sentence is not appropriate for his conviction of a Class C felony. Indiana Code § 35-38-1-7.1(b)(3) lists as a mitigating factor that the victim of the crime induced or facilitated the offense. Stone testified at the sentencing

hearing that T.E. had induced or facilitated the offense. T.E. testified to the contrary. In his sentencing statement the trial judge said that he did not see any act by the victim that could be remotely considered as contributing to this beating. To the extent that Stone argues that the trial court did not identify a potential mitigator, he is wrong.

It is within a trial court's discretion to decide both the existence and the weight of a significant mitigating circumstance. *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005). A sentencing court abuses its discretion by overlooking a mitigating circumstance only when there is substantial evidence in the record of significant mitigating circumstances. *Id.* Although the court must consider evidence of mitigating factors presented by a defendant, it is not required to find that any mitigating circumstances actually exist, nor is it obligated to explain why certain circumstances are not sufficiently mitigating. *Id.* The court is not compelled to credit mitigating factors in the same way as would the defendant. *Id.* On appeal, an allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

It is apparent from the record that the sentencing judge was not impressed with Stone's argument that T.E. contributed to the commission of the crime.

In conclusion Stone argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. *See, Banks v. State*, 841 N.E.2d 654, 657-8 (Ind. Ct. App. 2005), *trans. denied*. A party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. *Smith v. State*, 822 N.E.2d 193, 202-3 (Ind. Ct. App.

2005), *trans. denied*; Ind. App. Rule 46(A)(8)(a). Stone's argument on this issue is too general to be in compliance with the appellate rules. The argument is waived.

CONCLUSION

The trial court did not err in giving the disputed jury instruction or in admitting the photographs. Furthermore, the evidence is sufficient to support the verdict and the eight-year sentence is appropriate.

Judgment affirmed.

MATHIAS, J., and SULLIVAN, J., concur.